



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidance on Bringing Enforcement Actions Against
POTWs for Failure to Implement Pretreatment
Programs

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Attached is a final guidance document that explains the legal and policy considerations involved in deciding whether and how EPA shall pursue enforcement actions under the Clean Water Act against POTWs that have failed to adequately implement their pretreatment programs.¹ A model judicial complaint and model consent decree for failure to implement cases are included with this Guidance.² We will be preparing model administrative pleadings for these cases in the near future.

¹ This guidance document was distributed in draft for comment on February 11, 1988 (the draft was marked "January 1988 Regional Comment Draft"). We received comments from seven regions, two headquarters' offices, and the Department of Justice. The comments were generally favorable and the Guidance has been revised pursuant to those comments.

² Drafts of the model judicial complaint and consent decree were sent to several regions and the Department of Justice for review in May 1988. We received helpful comments and the enclosed models have been revised accordingly.

Now that virtually all Federally required local pretreatment programs have been approved, EPA is placing a high priority on assuring that programs are fully implemented. Thus, EPA Regions and NPDES States now record on the Quarterly Noncompliance Report, pursuant to the definition of Reportable Noncompliance for POTW pretreatment program implementation, those POTWs that have failed to adequately implement their pretreatment program requirements.³

Given finite resources, EPA enforcement actions will not be appropriate for all of the POTWs that are listed on the QNCR for Reportable Noncompliance with pretreatment implementation requirements. The enclosed guidance document is intended to help EPA Regions select the best cases for enforcement in this area.

Enforcement actions against POTWs for failure to implement will be a high priority in FY 1989. Consistent with the attached guidance, we encourage all Regions to focus resources on POTWs that have failed to adequately implement their pretreatment programs.

We encourage all Regions to discuss any potential enforcement actions in this area with us. Discussion of potential cases for failure to implement should be directed to David Hindin, OECM-Water, (LE-134W), FTS 475-8547, or Ed Bender, OWE, (EN-338), FTS 475-8331.

Attachment

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³ See, U.S. EPA, Office of Water Enforcement and Permits, Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Implementation Requirements, September 1987.

**GUIDANCE ON BRINGING ENFORCEMENT ACTIONS AGAINST POTWS
FOR FAILURE TO IMPLEMENT PRETREATMENT PROGRAMS
August 4, 1988**

TABLE OF CONTENTS

I. EXECUTIVE SUMMARY	1
II. INTRODUCTION: POTW Implementation as the Key to an Effective National Pretreatment Program . .	4
A. Purpose of this Guidance	4
B. Related Pretreatment Guidance Documents	5
C. Background on the National Pretreatment Program	6
III. LEGAL BASIS FOR ENFORCING POTW PRETREATMENT PROGRAM IMPLEMENTATION: Look First to a POTW's Permit . .	8
A. Statutory Authority for Requiring POTW Pretreatment Programs	8
B. Civil Judicial Enforcement Authority	9
C. Administrative Enforcement Authority	12
D. Criminal Penalty Authority	13
IV. IDENTIFYING POTW PRETREATMENT IMPLEMENTATION VIOLATIONS LIKELY TO MERIT AN ENFORCEMENT RESPONSE: Evaluating a POTW's Actions In Light of Allowed Flexibility and Impact of the Violation	14
A. Identifying Potential Violations	14
B. Determining the Extent To Which Identified Violations Warrant an Enforcement Response: How Strong Are EPA's Claims?	16
1. Evaluating Unreasonable POTW Action Under Flexible Implementation Requirements	16
2. Evaluating the Impact or Severity of Identified Violations	18
a. Inadequate Program Implementation Causing POTW Effluent Limit Violations.	18
b. Inadequate Implementation Not Causing Effluent Violations	19
V. ENFORCEMENT OPTIONS FOR FAILURE TO IMPLEMENT	20
A. General Considerations for Choosing an Appropriate Enforcement Response	20
B. Penalty Assessments	22
C. Joining Industrial Users (IUs) and States	23

**ATTACHMENT A: MODEL FORM FOR LISTING AND EVALUATING
PRETREATMENT IMPLEMENTATION VIOLATIONS**

ATTACHMENT B: MODEL CIVIL JUDICIAL COMPLAINT FOR
PRETREATMENT IMPLEMENTATION CASE

ATTACHMENT C: MODEL CIVIL JUDICIAL CONSENT DECREE FOR
PRETREATMENT IMPLEMENTATION CASE

LIST OF TABLES

TABLE 1	
DEFINITION OF REPORTABLE NONCOMPLIANCE	15a

TABLE 2	
EXAMPLES OF VIOLATIONS BASED ON A REASONABLE INTERPRETATION OF THE PRETREATMENT IMPLEMENTATION REGULATIONS WHEN INCORPORATED BY REFERENCE INTO THE PERMIT	16a

TABLE 3	
GENERAL GUIDELINES FOR EVALUATING THE SEVERITY OF PRETREATMENT IMPLEMENTATION VIOLATIONS	20a

I. EXECUTIVE SUMMARY

This guidance document explains the legal and policy considerations involved in deciding whether and how EPA shall pursue Federal enforcement responses under the Clean Water Act against POTWs that have been identified on the Quarterly NonCompliance Report as having failed to adequately implement their pretreatment programs.

Municipal pretreatment programs must be fully implemented in order to effectively control industrial discharges of toxic, hazardous, and concentrated conventional wastes into public sewers and, ultimately, our rivers and lakes. Now that EPA has approved virtually all Federally required local pretreatment programs, EPA is placing a high priority on assuring local program implementation. Thus, EPA Regions and NPDES States now record on the Quarterly Noncompliance Report those POTWs that have failed to adequately implement their pretreatment program requirements. EPA enforcement actions are necessary to ensure that POTWs fully implement their pretreatment programs. Indeed, this guidance document is intended to help EPA pursue enforcement actions in this area and establish a strong enforcement presence so as to assure proper program implementation on a broad scale from POTWs.

The decision to initiate an enforcement action against a POTW for its failure to adequately implement its pretreatment program requires a careful analysis of the underlying pretreatment program requirements, the legal basis for the violations and the seriousness of the violations. This is particularly true because of the differing implementation requirements which may apply to individual POTWs. In addition, the flexibility which many implementation requirements intentionally allow necessitates the use of considerable judgment in deciding whether to find a POTW in violation.

From a legal and equitable perspective, EPA is in the strongest position to enforce pretreatment program implementation requirements that are contained in a POTW's NPDES permit, either directly within the pages of a permit or indirectly through a permit condition that requires a POTW to implement its approved program and/or comply with the pretreatment regulations, 40 CFR 403.

The following approach should be useful in identifying potential pretreatment implementation violations for possible enforcement responses. First, examine the POTW's permit to identify all pretreatment activities the POTW is required to implement. Second, review all pretreatment program annual reports that the POTW has submitted since its program was

approved. All pretreatment audits and inspections should also be reviewed to identify potential violations.

Third, compile a list of all pretreatment implementation requirements applicable to the POTW which available information indicates the POTW may have violated. (See Tables 1 and 2 for possible examples, such as failure to issue industrial user (IU) control mechanisms, failure to establish necessary local limits, or failure to enforce IU pretreatment requirements adequately.) Fourth, in some cases, send a §308 letter to obtain more complete information necessary to support an enforcement case.

Once all potential violations have been identified, each violation must be evaluated to determine the strength of EPA's claim of violations in light of the facts and any imprecision in the way the underlying pretreatment implementation requirements define compliance.

Despite the flexibility a POTW may have in implementing some pretreatment requirements, the fundamental yardstick for measuring compliance is that a POTW must act reasonably by implementing its pretreatment requirements consistent with an effective pretreatment program: i.e., a program that will prevent interference and pass through, and improve opportunities to recycle municipal and industrial wastestreams and sludges (see 40 CFR 403.2). EPA should evaluate the reasonableness of the POTW's implementation activity in light of both the flexibility afforded by the applicable requirements and the impact or severity of the potential violations. Preparing a table similar to the one in Attachment A for evaluating program implementation violations should be helpful in making enforcement decisions in this area.

As a general rule, the strongest enforcement case against a POTW for failure to implement its pretreatment program will contain POTW effluent limit violations attributable to inadequate implementation and a number of related POTW pretreatment implementation violations. Such cases are compelling because they indicate that a POTW's implementation of its program has been so deficient that IU discharges have not been adequately controlled and these discharges have caused a POTW to exceed the effluent limits in its permit (or otherwise violate its permit). This type of case may very well be appropriate for civil judicial enforcement.

The lack of POTW permit effluent discharge violations (attributable to inadequate pretreatment implementation) does not mean that EPA should overlook or trivialize other types of implementation violations. Inadequate pretreatment implementation still could result, for example, in the POTW discharging increased loadings of pollutants (including

toxics) not yet controlled by its permit, or in increasing the risk of future effluent limit violations. Thus, for example, a POTW that has failed to issue control mechanisms to a number of its significant IUs in direct violation of a permit requirement to do so is committing a serious violation that may very well be subject to an enforcement response.

Other cases in which a POTW is running a sloppy pretreatment program, with clear implementation violations, but in which there is so far no evidence of interference or pass through problems, may be appropriately dealt with by issuance of a traditional compliance administrative order or by assessment of an administrative penalty, or by initiation of a civil judicial action. EPA's pursuit of a penalty in these circumstances should have great value in demonstrating to POTWs that they must fully implement their pretreatment programs now and not wait until after effluent violations occur.¹ Such enforcement actions should help EPA send the message that prevention is the goal of pretreatment programs, not damage control after POTW effluent limits violations or other unwarranted discharges have occurred.

If an IU has caused interference or pass through at the POTW, or has violated local limits, categorical standards or other pretreatment requirements, EPA may bring a joint action against both the IU and the POTW. The importance of joining an IU in an enforcement action is increased if an IU is a primary cause of a POTW's effluent limit violations, if an IU has obtained a significant economic benefit from its noncompliance, or if an IU needs to install pretreatment equipment at its facility, especially if a POTW is unwilling or unable to force an IU to install the necessary equipment.

A model judicial complaint and consent decree for pretreatment failure to implement cases are included as attachments to this guidance. Model administrative pleadings will be prepared shortly for Regional distribution.

Disclaimer

This guidance document is intended solely for the use of Agency enforcement personnel. This guidance creates no rights, is not binding on the Agency, and the Agency may change this guidance without notice.

¹ Instructions on how to determine settlement penalties using the standard CWA Civil Penalty Policy criteria of economic benefit, gravity and appropriate adjustments are contained in EPA's draft Guidance, "Penalty Calculations for a POTW's Failure to Implement It's Pretreatment Program," distributed for Regional comment on August 1, 1988.

II. INTRODUCTION: POTW Implementation as the Key to an Effective National Pretreatment Program

A. Purpose of this Guidance

This document provides guidance on how and under what circumstances EPA should pursue administrative and judicial enforcement actions against Publicly Owned Treatment Works (POTWs) for violations of their pretreatment program implementation obligations arising under the Clean Water Act.

Local pretreatment programs must be fully implemented in order to effectively control industrial discharges of toxic, hazardous, and concentrated conventional wastes into public sewers and, ultimately, our rivers and lakes. Now that EPA has approved virtually all Federally required local pretreatment programs, EPA is placing a high priority on assuring local program implementation. Thus, EPA Regions and NPDES States now record on the Quarterly Noncompliance Report those POTWs that have failed to adequately implement their pretreatment program requirements. EPA enforcement actions are necessary to ensure that POTWs fully implement their pretreatment programs..

National guidance is needed for bringing enforcement actions against POTWs for their failure to adequately implement their pretreatment programs for four reasons. First, the determination of whether a POTW is violating its pretreatment program requirements, and whether such violations are serious, may involve careful, subtle judgments. Second, even though the failure to adequately implement may be clear, subtle legal issues may be involved in determining the best way to frame the Government's cause of action. Third, there is a need for national consistency to ensure that POTWs and their industrial users receive a consistent and strong message that pretreatment requirements must be complied with and that violations will not be tolerated. Fourth, pretreatment implementation cases are new and thus there are neither settled nor litigated precedents to follow in this area.

This guidance document builds upon the Office of Water Enforcement and Permit's (OWEP) definition of Reportable Noncompliance for POTW pretreatment program implementation.² EPA Regions and NPDES States use this definition of Reportable Noncompliance to identify and list on the Quarterly Noncompliance Report (QNCR) those POTWs that have failed to

² U.S. EPA, OWEP. Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Requirements. September 1987.

adequately implement their pretreatment program requirements. Given finite resources, EPA enforcement actions will not be appropriate for all of the POTWs that are listed on the QNCR for Reportable Noncompliance with pretreatment implementation requirements. This guidance document is intended to help EPA Regions select the best cases for enforcement in this area and thus establish a strong enforcement presence in order to ensure full program implementation across the nation by local POTWs.

B. Related Pretreatment Guidance Documents

In addition to this guidance document, there are five other EPA documents that are particularly relevant to bringing enforcement actions against POTWs for failure to implement. As indicated above, on September 30 1987, EPA issued a guidance document that explains how POTW noncompliance with pretreatment implementation requirements should be evaluated and reported on the QNCR. In short, today's guidance document expands upon the September 1987 Reportable Noncompliance guidance by detailing the considerations involved in bringing an enforcement action against a POTW listed on the QNCR pursuant to the definition of Reportable Noncompliance.

Another important document is OWEF's July 25, 1986 guidance, entitled, "Pretreatment Compliance Monitoring and Enforcement Guidance" (published as an EPA document in September 1986). This document provides POTWs with information about their pretreatment implementation responsibilities and describes the procedures POTWs should implement in order to successfully operate their approved pretreatment programs. In short, the document recommends standards of performance for a good pretreatment program.

Two other guidance documents, both issued on September 20, 1985, are also relevant to bringing failure to implement cases.³ One document, entitled "Guidance on Obtaining Submittal and Implementation of Approvable Pretreatment Program," discusses EPA enforcement and permitting policy on obtaining POTW pretreatment program submittal and implementation. The other document, entitled "Choosing Between Clean Water Act §309(b) and §309(f) as a Cause of Action in Pretreatment Enforcement Cases" describes the legal considerations involved in choosing a cause of action in a pretreatment case.

³ Copies of both documents are contained in the CWA Compliance/Enforcement Policy Compendium, Volume II, §VI.B. Copies of the Compendium are in OECM's new computer data base, the Enforcement Document Retrieval System.

Finally, on August 1, 1988, EPA distributed draft guidance, for Regional review, that explains how the CWA Civil Penalty Policy should be applied to cases in which a POTW has failed to adequately implement its pretreatment program. This document, entitled "Penalty Calculations for a POTW's Failure to Implement It's Pretreatment Program" discusses the specific considerations involved in making penalty policy calculations for failure to implement violations.

C. Background on the National Pretreatment Program

The National Pretreatment Program is an integral part of the national goal to eliminate the discharge of pollutants into the nation's waters (§101 of CWA). The National Pretreatment Program's primary goal is to protect POTWs and the environment from the detrimental impact that may occur when toxic, hazardous or concentrated conventional wastes are discharged into a sewage system. With the retention of the Domestic Sewage Exclusion in RCRA, and as RCRA regulations for the disposal of hazardous waste in land fills become more restrictive, the amount of hazardous waste entering POTWs is expected to increase.⁴ Thus, the role of pretreatment in controlling hazardous waste must also increase.

The role of pretreatment in controlling toxic pollutants must also increase as water quality-based toxics limits and monitoring requirements become a more common provision in the NPDES permits of POTWs. In order to comply with water quality-based toxics requirements, POTWs must fully implement their pretreatment programs in order to effectively control the discharge of toxic pollutants by industrial users.

The governmental entity that primarily implements pretreatment controls on industrial users (IUs) is usually the local municipality. The municipality, through its POTW, is called the Control Authority because it has the primary responsibility to control the industrial wastes that are

⁴ The domestic sewage exclusion in RCRA, §1004(27), allows wastes which otherwise would be considered hazardous and regulated under RCRA, to be exempted from RCRA regulations when mixed with domestic sewage and discharged to a POTW. Pursuant to RCRA §3018, EPA concluded that the Domestic Sewage exclusion should be retained because the CWA pretreatment program is the best way to control hazardous waste discharges to POTWs.

entering its sewer system.⁵ The Agency confirmed this responsibility that POTWs have in the preamble to its final 1978 General Pretreatment Regulations, 43 F.R. 27736, June 26, 1978. In that preamble the Agency stated:

"Thus in the amendments to sections 309 and 402 of the Clean Water Act, Congress assigned the primary responsibilities for enforcing national pretreatment standards to the POTWs, while providing the EPA or the NPDES state with the responsibility to assure that local government fulfills this obligation." 43 F.R. at 27740.

U.S. EPA is performing four basic activities to ensure the success of the National Pretreatment Program. First, EPA has been developing national categorical pretreatment standards that contain effluent discharge limits for particular industrial processes.

Second, EPA has promulgated the General Pretreatment Regulations, 40 CFR 403. These regulations, inter alia, establish the criteria and procedures for the development, approval and implementation of local POTW pretreatment programs. Section 403.5 of these regulations prohibits the discharge of pollutants, by IUs, into a POTW that may cause interference or pass through at a POTW.

Third, EPA has issued guidance documents and conducted training seminars in order to help POTWs understand, develop and implement effective pretreatment programs.

Fourth, EPA must ensure that POTWs receive a strong message that full implementation of their pretreatment programs is required and will be legally enforced. With approximately 1500 approved local programs, the push to get POTWs to develop pretreatment programs is now largely complete. The next step is to make sure that these local pretreatment programs are fully implemented: Approved local programs must not be allowed to sit on the shelf and gather dust. Lifeless rivers, poisoned water supplies and crippled

⁵ States also play an important role in the National Pretreatment Program. Once a state has been authorized by EPA to operate the National Pretreatment Program in its territory, the state is then responsible for approving, monitoring and regulating the performance of all the local POTW pretreatment programs. To date, 24 States have received federal pretreatment authority. These states are called Approval Authorities. For those states without an approved pretreatment program, EPA is the Approval Authority.

sewage treatment plants are the possible consequences if POTWs do not fully implement their pretreatment programs.

In order to ensure that POTWs fully implement their pretreatment programs, EPA intends to focus much of its oversight and enforcement resources on proper and full implementation of local pretreatment programs. To this end, EPA Regions now identify those POTWs that have failed to adequately implement their pretreatment programs and report these POTWs on the QNCR pursuant to the definition of Reportable Noncompliance for pretreatment program implementation. EPA Regions should then initiate enforcement actions against POTWs with serious pretreatment implementation violations.⁶ Such enforcement actions are necessary to force the violating POTW to comply and to deter other POTWs from neglecting their pretreatment obligations.

III. LEGAL BASIS FOR ENFORCING POTW PRETREATMENT PROGRAM IMPLEMENTATION: Look First to a POTW's Permit

A. Statutory Authority for Requiring POTW Pretreatment Programs

Section 301 of the Clean Water Act prohibits the discharge of any pollutant except in compliance with the effluent limits established in §301 and the requirements in sections 302, 306, 307, 308, 402 and 404. The most relevant sections for pretreatment are 307 and 402.

EPA's authority to establish pretreatment effluent standards is contained in §307 of the Act. Section 307(b)(1) requires EPA to promulgate regulations:

"establishing pretreatment standards for [the] introduction of pollutants into treatment works ... which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operations of such treatment works. ... Pretreatment standards under this subsection ... shall be established to prevent the discharge of any pollutant through treatment works ... which are publicly owned, which pollutant

⁶ Of course, EPA Regions should initiate these enforcement cases consistent with the role of a state that has an approved state pretreatment program. EPA Regions should encourage states with approved programs to initiate state enforcement actions against violating POTWs.

interferes with, passes through, or otherwise is incompatible with such works."

In 1977, Congress amended §402(b)(8) to require a state that wishes to receive EPA approval to operate the NPDES program in its territory to have adequate authority:⁷

"[t]o insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307(b) of this Act into such works and a program to assure compliance with such pretreatment standards by each such source ..."

Section 402(b)(8) further mandates that a state program have adequate authority to require POTWs to inform the state permitting agency of (1) the introduction of pollutants into the POTW from a new source, (2) a substantial change in the volume or character of pollutants coming into the POTW from an existing source and (3) any anticipated impact of such changes on the POTW's effluent discharge. In short, any state desiring to administer its own NPDES permit program must issue permits that require POTWs to have programs that will assure compliance with pretreatment standards.

The language of §402 indicates that POTWs are obligated to have programs to assure compliance with pretreatment requirements and gives EPA and approved states the authority and obligation to require POTWs to develop and implement effective pretreatment programs.

B. Civil Judicial Enforcement Authority

EPA's civil authority to obtain injunctive relief to enforce the obligation that POTWs adequately implement their pretreatment programs is contained in §309(a)(3) of the Act, which reads, in pertinent part:

"Whenever ... the Administrator finds that any person is in violation of section 301, 302, 306, 307, 308, 318, or 405 of this Act, or is in violation of any permit condition or limitation implementing any of such sections in a permit

⁷ The requirements that govern a state NPDES program under §402(b) of the Act also apply to U.S. EPA where EPA is administering the NPDES program. §402(a)(3).

issued under section 402 of this Act by him or a State ..., he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section."

Section 309(b) of the Act authorizes EPA, in pertinent part,:

... to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he [EPA Administrator] is authorized to issue a compliance order under subsection(a) of this section. ...

Civil penalty liability is established in §309(d) of the Act, which reads, in pertinent part:

"Any person who violates section 301, 302, 306, 307, 308, 318, or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator, or by a State. ..., or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of this Act, and any person who violates an order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed \$25,000 for each violation."

Thus, §309(b) and (d) of the Act give EPA plenary authority to bring a civil action for injunctive relief and penalties against a municipality that has violated the pretreatment implementation requirements contained in its NPDES permit and any requirements contained in an approved pretreatment program incorporated by reference into the permit. EPA also can enforce the pretreatment regulations, 40 CFR 403, if the permit (or approved program incorporated by reference into the permit) appropriately references the regulations. Specifically, EPA's cause of action under §309(b) and (d), in those circumstances, is that the POTW has violated a permit condition authorized by the statute for the purpose of implementing §307 of the Act.

In some circumstances, EPA may seek to require a POTW to implement an approved program or regulatory requirement in the absence of an NPDES permit condition requiring program implementation or compliance with the regulations where, for example, EPA can establish that the absence of an active pretreatment program is contributing to POTW effluent violations or the absence of a pretreatment program is causing apparent environmental problems. In this situation,

EPA could sue the POTW for NPDES permit violations other than inadequate implementation under § 309(b) and (d) of the Act and seek pretreatment implementation as "appropriate relief" under §309(b).

Also in some circumstances, EPA may seek injunctive relief under §309(f) of the Act to require a POTW to implement a pretreatment program (in the absence of a permit condition requiring implementation) if one or more IUs are violating federal pretreatment standards. Under §309(f) of the Act, EPA would have to establish that requiring a POTW to implement a pretreatment program is an element of "appropriate relief" and that such appropriate injunctive relief would remedy the IU noncompliance with federal pretreatment standards.⁸

As a general rule, EPA will be in the strongest position, from a legal and equitable perspective, to bring an enforcement action against a POTW for pretreatment program implementation violations when the case is based on violations of the POTW's NPDES permit related to pretreatment implementation. Permit requirements vary across POTWs and thus each permit must be reviewed to identify the specific implementation requirements. The ideal NPDES permit for a POTW with a pretreatment program should establish three types of implementation requirements as conditions of the permit:⁹

(1) The permit should incorporate by reference the approved pretreatment program and require the POTW to comply with and implement the program.

(2) The permit should require the POTW to comply with the federal pretreatment regulations at 40 CFR 403 and to implement its approved pretreatment program consistent with the federal pretreatment regulations. The permit also should require the POTW to comply, within 30 days after receiving notice from its Approval Authority, with all revisions to the pretreatment regulations subsequently promulgated.

(3) The permit should, as needed, set out more specific requirements relating to important implementation procedures of the pretreatment program, and require the POTW to comply with these requirements by specific dates. For example, the permit could require the POTW

⁸ Further details on bringing cases in these limited circumstances are contained in the two September 20, 1985, documents discussed earlier, at page 5.

⁹ Permits that lack all three of these provisions should be modified as soon as possible, but no later than when the permit is next re-issued.

to inspect and sample IUs on an enumerated schedule (perhaps a specific number each quarter), beyond just simply requiring an inspection and sampling program.

The strongest enforcement cases consequently are likely to contain allegations that the POTW has violated its permit by failing to, for example,:

- (1) perform a specific pretreatment activity directly required by its permit;
- (2) fully implement its approved pretreatment program as explicitly required by its permit; and/or
- (3) comply with the 40 CFR 403 regulations (especially, §§403.5 and 403.8(f)) as directly required by its permit.

C. Administrative Enforcement Authority

Under §309(a)(3) of the Act, EPA can administratively order a POTW to comply with the pretreatment program requirements contained in its permit and its approved pretreatment program incorporated by reference into the permit. EPA Regions also can issue an administrative order (AO) requiring a POTW to comply with the pretreatment regulations if the permit (or approved program incorporated into the permit by reference) requires compliance with the regulations. As stated previously, EPA is in the strongest position to enforce a pretreatment implementation requirement, either administratively or judicially, if the POTW's permit (or approved program or regulations, incorporated into the permit) imposes that requirement on the POTW.

If neither the permit nor the incorporated program requires a POTW to comply with the regulations, and a POTW is otherwise in compliance with its permit and approved program, but not with requirements in the regulations, then the recommended course of action is for the Region (or authorized state) to expeditiously modify a POTW's permit to incorporate all applicable pretreatment regulatory requirements into the permit explicitly or by reference.¹⁰ An AO may, nevertheless, be an appropriate tool for enforcing pretreatment program implementation not otherwise required in the POTW's permit, where, for example, the POTW is violating effluent limits in its permit which violations are related to the POTW's failure to implement its local pretreatment program.

¹⁰ Applicable regulatory procedures to modify permits must, naturally, be followed.

The Water Quality Act of 1987 authorized EPA to assess penalties administratively for violations of the Clean Water Act. Under §309(g), EPA may impose penalties for virtually the entire range of violations that are subject to civil penalties under §309(d). Administrative penalties may be assessed up to a maximum of \$25,000 following Class 1 informal procedures and a maximum of \$125,000 under Class 2 formal APA procedures. Administrative penalties cannot be imposed for violations of §309(a) administrative compliance orders, but, of course, may be imposed for underlying violations.¹¹ Administrative penalty authority, by itself, does not include the power to directly order a violator to stop continuing violations or take alternative activities to achieve compliance.

Subject to these qualifications, EPA now has administrative authority to assess penalties against a POTW that violates (1) the pretreatment implementation requirements contained in its permit, (2) an approved program incorporated into its permit, or (3) the pretreatment regulations if the permit or approved program appropriately references the regulations. Regions should review EPA's "Guidance Documents for Implementation of Administrative Penalty Authorities," August 1987, for the details on how to initiate these enforcement actions.¹²

D. Criminal Penalty Authority

Under §309(c), EPA has the authority to assess criminal penalties for negligent or knowing violations of the Act, for violations that knowingly put another person in imminent danger of death or serious bodily injury, or for making false statements under the Act. Criminal penalties can be assessed for the entire range of violations that are covered by EPA's civil and administrative authorities in §309(a), (b) and (d). For example, a POTW that falsely reports to its Approval Authority that it is complying with a pretreatment implementation requirement is a potential candidate for criminal enforcement.

¹¹ Civil penalties can be imposed judicially under §309(d) of the Act for violations of administrative (compliance) orders issued pursuant to §309(a) of the Act.

¹² EPA Regions should, naturally, include a copy of the POTW's permit in any proposed administrative penalty action sent to Headquarters for review.

IV. IDENTIFYING POTW PRETREATMENT IMPLEMENTATION VIOLATIONS LIKELY TO MERIT AN ENFORCEMENT RESPONSE:

Evaluating a POTW's Actions In Light of Allowed Flexibility and Impact of the Violation

A. Identifying Potential Violations

Once a POTW is listed on the QNCR for Reportable Noncompliance with pretreatment program implementation requirements (or the noncompliance otherwise comes to the Region's attention), the Region should evaluate whether to initiate an enforcement action.¹³ In order to perform this evaluation, the Region should identify all potential pretreatment violations. Once the Region has identified all potential violations, it must examine the extent, scope, and impact of these potential violations to determine whether and what kind of an enforcement response is warranted.

This evaluation is necessary because some pretreatment requirements intentionally allow a POTW considerable flexibility in implementation. This flexibility may result in a pretreatment requirement lacking a completely precise definition of noncompliance, thereby calling for some exercise of judgment in determining whether a POTW violated the pretreatment requirement.

As an example, consider a POTW with a permit condition that requires the POTW to "analyze self-monitoring reports submitted by its IUs and then respond to those reports that indicate violations or other problems." Assume the facts reveal that this POTW reads each self-monitoring report and usually, but not always, writes a letter to those IUs that are violating their local limits. By themselves these facts may not be sufficient to demonstrate that this POTW has failed to implement this requirement in a reasonable fashion and thus has violated this pretreatment requirement. In contrast, if the facts revealed that the POTW rarely read the self-monitoring reports and that most were sitting in a pile unopened, this would almost certainly be a violation of the pretreatment implementation requirement.

The following approach should prove helpful in identifying all potential violations. First, the region should

¹³ Before a POTW appears on the QNCR for Reportable Noncompliance, a region or state Approval Authority is likely to have already initiated informal enforcement actions against the POTW (e.g., NOV's or compliance meetings) in an attempt to correct the violations and bring the POTW back into compliance.

examine the POTW's permit (and approved program and Federal regulations where the permit incorporates these requirements by reference) to identify all pretreatment activities the POTW is required to implement. The Region must perform this step carefully, since the specific enforceable requirements set out in POTW permits (or approved programs appropriately incorporated in a POTW permit) can vary significantly across the 1500 or so POTWs with approved pretreatment programs. EPA's Pretreatment Compliance Monitoring and Enforcement Guidance serves as a good reference point for the kinds of requirements that are likely to be applicable in a strongly crafted permit to obtain effective program implementation. In addition, 40 CFR 403.5 and 403.8 detail elements of an acceptable local pretreatment program. Indeed, the permit may very well require the POTW to implement its local program consistent with the Part 403 regulations.¹⁴

Second, the region should compare all available compliance information to the identified, applicable pretreatment program requirements. At a minimum, the Region should review all pretreatment program annual reports that the POTW has submitted since its program was approved. The annual reports should be checked to make certain that they are complete and supply all the information required by the permit or approved program.¹⁵ Naturally, all pretreatment program audits and inspections that have been performed by the Region or the state should also be reviewed to identify potential violations.

Third, the region should compile a list of all pretreatment implementation requirements applicable to the POTW which available information indicates the POTW may have violated. Fourth, in some circumstances, the region may wish to obtain more additional information by issuing a §308 letter to a POTW to fill in gaps in compliance information.

As a rough check that all potential violations have been identified, the Region should review the definition of Reportable Noncompliance contained in Table 1 and the examples of possible pretreatment implementation violations

¹⁴ Table 2 provides a listing of some potential violations that might arise from a POTW's failure to comply, as instructed to by its permit, with the federal pretreatment regulations.

¹⁵ Pursuant to the PIRT June 1986 proposed rule, EPA will be promulgating shortly a final regulation, 40 CFR 403.12(i), requiring POTWs with approved pretreatment programs to submit annual reports describing the POTW's pretreatment activities.

TABLE 1*

DEFINITION OF REPORTABLE NONCOMPLIANCE

A POTW should be reported on the QNCR if the violation of its approved pretreatment program, its NPDES permit or an enforcement order³ meets one or more of the following lettered criteria for implementation of its approved pretreatment program:

I. Issuance of IU Control Mechanisms

- A) Failed to issue, reissue, or ratify industrial user permits, contracts, or other control mechanisms, where required, for "significant industrial users" within six months after program approval. Thereafter, each "significant industrial user" control mechanism should be reissued within 90 days of the date required in the approved program, NPDES permit, or an enforcement order.

II. POTW Compliance Monitoring and Inspections

- B) Failed to conduct at least eighty percent of the inspections and samplings of "significant industrial users" required by the permit, the approved program, or an enforcement order.
- C) Failed to establish and enforce self-monitoring requirements that are necessary to monitor SIU compliance as required by the approved program, the NPDES permit, or an enforcement order.

III. POTW Enforcement

- D) Failed to develop, implement, and enforce pretreatment standards (including categorical standards and local limits) in an effective and timely manner or as required by the approved program, NPDES permit, or an enforcement order.
- E) Failed to undertake effective enforcement against the industrial user(s) for instances of pass-through and interference as defined in 40 CFR Section 403.3 and required by Section 403.5 and defined in the approved program.

IV. POTW Reporting to the Approval Authority

- F) Failed to submit a pretreatment report (e.g., annual report or publication of significant violators) to the Approval Authority within 30 days of the due date specified in the NPDES permit, enforcement order, or approved program.⁴

V. Other POTW Implementation Violations

- G) Failed to complete a pretreatment implementation compliance schedule milestone within 90 days of the due date specified in the NPDES permit, enforcement order, or approved program.⁴
- H) Any other violation or group of violations of local program implementation requirements based on the NPDES permit, approved program or 40 CFR Part 403 which the Director or Regional Administrator considers to be of substantial concern.⁴

³ The term enforcement order means an administrative order, judicial order or consent decree. (See Section 123.45)

⁴ Existing QNCR criterion (40 CFR Part 123.45), the violation must be reported

listed in Table 2. Table 2 contains a listing of possible violations based on a reasonable interpretation of the pretreatment implementation regulations (40 CFR 403) when such regulations are incorporated by reference into the permit. While the list in Table 2 is not exhaustive, it is illustrative of those violations that may justify an enforcement response by EPA for failure to implement.

Once all potential violations have been identified, each potential violation must be evaluated to determine the strength of EPA's claim of violation in light of the facts and any imprecision in the way the underlying pretreatment implementation requirement defines compliance.¹⁶ Each potential violation should be evaluated in this manner to determine the strength of a possible EPA claim of a violation of an underlying pretreatment requirement. After these evaluations are completed the Region should produce a table of violations which the Region concludes are strong enough to pursue. Such a table should ~~describe each violation and~~ identify the specific underlying legal requirement that was violated. In addition, such a table should indicate the duration of the violation and indicate how strong the evidence is supporting the violation. A model form for this process is included here as attachment A.

B. Determining the Extent To Which Identified Violations Warrant an Enforcement Response: How Strong Are EPA's Claims?

The strength of EPA's claims naturally will affect EPA's decision regarding whether to pursue an enforcement action against a POTW for failing to implement a local pretreatment program. In turn, the strength of EPA's enforcement claims depends to a large degree on the extent to which identified violations demonstrate that a POTW has acted unreasonably in meeting pretreatment program implementation requirements, given (1) the flexibility afforded by many requirements and (2) the impact or severity of the violations. More specifically, the more flexible the implementation requirements, the more important the need to demonstrate the extensiveness or severity of the violation.

1. Evaluating Unreasonable POTW Action Under Flexible Implementation Requirements. Some pretreatment implementa-

¹⁶ Recall that EPA is in the strongest position to enforce a requirement if the requirement is expressly stated in the permit, in the approved program incorporated by reference into the permit, or in the regulations if the permit requires the POTW to comply with the regulations.

TABLE 2

EXAMPLES OF VIOLATIONS BASED ON A REASONABLE INTERPRETATION
OF PRETREATMENT IMPLEMENTATION REGULATIONS WHEN INCORPORATED
BY REFERENCE INTO THE PERMIT*

1. Failed to develop and/or implement procedures that reasonably identify all IUs, including new users. See 40 CFR 403.8(f)(2)(i).
2. Failed to develop and/or implement procedures that reasonably identify all incoming pollutants, including changes in the nature and volume of incoming pollutants. See 40 CFR 403.8(f)(2)(ii).
3. Lack of procedures to keep POTW itself informed of minimum legal requirements of pretreatment or keep its IUs informed. See 40 CFR 403.8(f)(2)(iii).
4. Failed to implement a system that allows the orderly receipt and informed analysis of self-monitoring reports. See 40 CFR 403.8(f)(2)(iv).
5. Failed to inspect and sample the effluent from IUs as often as is necessary to assure compliance with pretreatment standards and requirements. See 40 CFR 403.8(f)(2)(v).
6. Failed to investigate or respond adequately to instances of IU noncompliance. See 40 CFR 403.8(f)(2)(vi).
7. Failed to publish, at least annually, in the largest daily newspaper, a list of those IUs which, during the previous 12 months, were significantly violating applicable Pretreatment Standards and Requirements. See 40 CFR 403.8(f)(2)(vii).
8. Changes to POTW's legal authority such that the program no longer satisfies the minimum legal requirements of 40 CFR 403.8(f)(1).
9. Has never enforced its local limits beyond a telephone call or letter to the violating IU despite repeated violations by IUs. See 40 CFR 403.5(c)
10. Deficient POTW resources (supplies, equipment, personnel) which seriously hinder a POTW's ability to implement an effective pretreatment program pursuant to 40 CFR 403.8(f)(1) & (2). See 40 CFR 403.8(f)(3).

* EPA's enforcement case is strongest where the violations are based on an implementation requirement contained in a POTW's permit, either explicitly or by reference.

tion requirements are quite specific and thus the determination of whether a POTW fully complied with such requirements will be straightforward. For example, if a permit requires a POTW to issue control mechanisms to all its significant IUs within one year of program approval, one year after program approval the facts should be clear whether or not a POTW complied with this requirement.

However, the pretreatment requirements contained in permits and approved programs, as well as the regulations, are often written in general terms that give a POTW considerable flexibility in implementing a given requirement. Indeed, virtually all regulatory implementation requirements allow some flexibility in implementation. While a POTW may have considerable flexibility in implementing some pretreatment requirements, a POTW must act reasonably by implementing its pretreatment requirements consistent with the objectives of the National Pretreatment Program. These objectives are presented in 40 CFR 403.2:

- (a) To prevent the introduction of pollutants into POTWs which will interfere with the operation of a POTW, including interference with its use or disposal of municipal sewage;
- (b) To prevent the introduction of pollutants into POTWs which will pass through the treatment works or otherwise be incompatible with such works; and
- (c) To improve opportunities to recycle and reclaim municipal and industrial wastewaters and sludges.

POTWs are on notice of these objectives and thus should implement a pretreatment program that "assure[s] compliance with pretreatment standards to the extent applicable under section 307(b)." 40 CFR 122.44(j)(2).¹⁷ In short, a POTW's implementation of its pretreatment requirements must be reasonable: that is, consistent with the objectives of an effective pretreatment program.

In determining whether a POTW's implementation of a pretreatment requirement is reasonable or appropriate, the Regions again may wish to review OWEP's July 1986, "Pretreatment Compliance Monitoring and Enforcement Guidance". This document provides POTWs with information about their pretreatment implementation responsibilities and describes the

¹⁷ The last sentence of §403.8(b) and the first sentence of §403.8(f)(2) contain similar language requiring a POTW to implement its pretreatment program in order to ensure compliance with pretreatment standards. See also §402(b)(8) of the Act.

rationale behind the procedures POTWs should implement in order to successfully operate their approved programs.

For example, one such potentially flexible requirement is the important permit condition that a POTW enforce all pretreatment standards and requirements, including local limits and categorical pretreatment standards.¹⁸ There will be situations in which a POTW's performance is so inadequate that there is no doubt that this requirement was violated. For example, there is no doubt that a POTW that generally ignores most violations of local limits by its IUs, has never enforced beyond issuing a letter of violation to an IU, and that consequently has violated its effluent limits due to interference or pass through problems has violated its requirement to enforce pretreatment standards and requirements.

In contrast, consider a POTW that regularly issues letters of violations, has collected penalties from some IUs that were violating local limits, but has allowed a few IUs to violate local limits and cause interference violations without escalating its enforcement response beyond the issuance of "lenient" compliance schedules for the IUs. Such facts may paint a much more complicated picture on which to base a finding that this POTW is not complying with its obligation to enforce pretreatment standards. In situations such as this, EPA Regions must evaluate all the facts to determine whether a POTW has taken reasonable actions consistent with its obligation to enforce its program. If the Region believes that a POTW has not taken reasonable actions to comply with its obligation here and specific deficiencies can be identified, then this POTW should be considered in violation of its permit.

2. Evaluating the Impact or Severity of Identified Violations.

a. Inadequate Program Implementation Causing POTW Effluent Limit Violations. The most significant pretreatment implementation violation is failing to prevent interference or

¹⁸ Much of the lack of precision in this requirement can be eliminated if a POTW is required to develop and implement an enforcement response plan that details how a POTW will respond to different kinds of violations by its IUs. See Enforcement Response Guide, §3.3 and Table 3-2, in OWE's July 1986 "Pretreatment Compliance Monitoring and Enforcement Guidance."

pass through.¹⁹ By regulatory definition, interference or pass through basically exists when an IU discharge is a cause of POTW effluent limit violation or inability to use or dispose of sewage sludge properly. Thus, a POTW which is violating its permit limits because of the IU discharges it is accepting has failed to implement a successful pretreatment program as defined by the Act.

A POTW that has experienced repeated interference or pass through problems but has taken no definite action to remedy the situation (i.e., to control the discharges of its IUs) generally should be an ideal candidate for an enforcement action. The fact that effluent violations have occurred at the POTW strongly suggests that the POTW is not effectively implementing its pretreatment program.

b. Inadequate Implementation Not Causing Effluent Violations. The lack of an interference or pass through violation, or any permit effluent discharge violation, does not mean that EPA should overlook or trivialize other types of implementation violations.

Beyond undermining the integrity of the national pretreatment program, a POTW's failure to implement a pretreatment program which does not lead to effluent limits violations can result in the discharge to waters of the United States or in a POTW's sludge of higher levels of pollutants, particularly toxics, which may not yet be controlled under the POTW's permit. In addition, an improperly implemented pretreatment program may allow slug loadings from IUs which might go undetected if the POTW is not sampling its effluent at appropriate times.

Moreover, inadequate implementation by one POTW may give its IUs an unfair advantage relative to industries discharging into another POTW and thereby may induce the second POTW to forego adequate pretreatment program implementation. Finally, inadequate local program implementation generally jeopardizes the ability of the National Pretreatment Program to effectively control industrial discharges of toxic and hazardous pollutants.

¹⁹ Recall that §402(8) of the Act requires pretreatment programs to assure compliance with pretreatment standards and that such standards, pursuant to §307(b) of the Act, are "established to prevent the discharge of any pollutant through [publicly owned] treatment works ... which pollutant interferes with, passes through, or otherwise is incompatible with such works. [emphasis added]" See also 40 CFR 403.5(a) and (c).

Thus, a Region should evaluate each violation to determine its severity or seriousness. Violations that are truly minor, with no impact on the ability of a POTW to conduct an effective pretreatment program, should be so identified. Each violation should be evaluated with respect to the general guidelines listed in Table 3.

A Region may find it helpful to assign a numerical ranking to each identified violation reflective of its severity. The model form for creating a list of violations in Attachment A contains a numerical scale ranging from 1 (minor violation) to 5 (violation creating injury or risk of injury to human health or the environment) which may be used to rate the severity of each identified violation.

Of course, a violation which may not be severe and may not present EPA with a strong enforcement claim individually may very well warrant enforcement action by EPA if the POTW is committing a number of such violations simultaneously, even if the enforceable requirements afford a considerable amount of flexibility. Such a broad pattern of minor failures can add up to inadequate program implementation when viewed as a whole. Naturally, the more such violations are present, the stronger EPA's enforcement case.

V. ENFORCEMENT OPTIONS FOR FAILURE TO IMPLEMENT

A. General Considerations for Choosing an Appropriate Enforcement Response

Once a POTW has been identified as having pretreatment implementation violations meriting a formal enforcement response, the Region has several options to choose from in selecting an appropriate enforcement response. The available statutory enforcement responses are:

1. Administrative (compliance) Order -- §309(a)
2. Administrative penalty assessment -- §309(g)
3. Civil Judicial Action -- §309(b) & (d), 309(f)²⁰
4. Criminal Judicial Action Referral -- §309(c).

²⁰ If there is not enforceable permit language requiring pretreatment program implementation but an IU is violating federal pretreatment standards, EPA can use §309(f) to initiate a judicial action seeking appropriate injunctive relief against both the IU and the POTW [see page 10]. Section 402(h) also may provide a useful cause of action in some circumstances where a sewer hook-up ban may be appropriate relief to pursue.

TABLE 3

GENERAL GUIDELINES FOR EVALUATING THE SEVERITY
OF PRETREATMENT IMPLEMENTATION VIOLATIONS*

For each potential violation, consider:.

- A. Importance of activity at issue to environmental success of the POTW's pretreatment program.
- B. Any identifiable environmental/public health harm or risk created by the alleged violation?
- C. Is the quantity of pollutants being discharged into the receiving stream higher than it would otherwise be if the POTW was complying with the requirement at issue? By how much?
- D. Did the POTW benefit economically from the alleged violation?
- E. Are IUs benefiting economically (avoiding the costs of compliance) by the POTW's failure to implement this program requirement?
- F. Has the violation persisted after the POTW was informed of this violation? And then ordered to remedy the situation?
- G. How long has this violation persisted over time or is it more like a single, isolated incident of noncompliance?

* In general, this evaluation should be performed after a POTW has been listed on the QNCR for Reportable Noncompliance with pretreatment program implementation requirements.

In selecting an appropriate enforcement response, the Region should consider the overall severity of the violations, the compliance history and commitment of the POTW in question, whether injunctive relief is needed, whether a penalty is appropriate and if so, how large a penalty, and what kind of message needs to be sent to other POTWs (i.e., general deterrence).

The Regions should carefully consider using EPA's new administrative penalty authority in appropriate circumstances. The Regions should review the Agency guidance documents issued by the Office of Water and the Office of Enforcement and Compliance Monitoring (August 1987) for implementation of the new administrative penalty authorities. The document entitled "Guidance on Choosing Among Clean Water Act Administrative, Civil and Criminal Enforcement Remedies" should be particularly helpful in laying out the considerations involved in choosing between administrative and judicial enforcement actions.

As a general rule, the strongest enforcement case against a POTW for failure to implement its pretreatment program will generally involve POTW effluent violations and a number of related pretreatment implementation violations. In other words, the POTW's implementation of its pretreatment program has been so deficient that IU discharges have not been adequately controlled and these discharges have caused a POTW to exceed the effluent limits in its permit (or otherwise violate its permit). This type of case which calls for both injunctive relief and a substantial civil penalty is likely to be appropriate for civil judicial enforcement.

A case in which a POTW is running a sloppy or inadequate pretreatment program, with identifiable implementation violations, but in which there is so far no evidence of POTW effluent limit violations, may be appropriately dealt with by issuance of a traditional compliance administrative order or by assessment of an administrative penalty, or by initiation of a civil judicial action. EPA's pursuit of a penalty in these situations could have great value in demonstrating to POTWs that they must fully implement their pretreatment programs now and not wait until serious effluent violations occur. Enforcement actions initiated against POTWs for failure to implement in the absence of effluent limit violations (related to inadequate implementation) should help EPA send the message that prevention is the goal of pretreatment programs, not damage control after effluent limit violations have occurred.

There may be cases in which the POTW is complying with its permit and approved program, but nevertheless the Region believes that the POTW's pretreatment performance is inade-

quate. This situation is likely when the approved program does not specify all the necessary actions that the POTW should perform. In such a situation, if there are indeed no clear violations of the permit or approved program, the best course of action may be for the Region or approved state to expeditiously modify the POTW's permit and/or approved program to establish specific program implementation requirements to remedy the situation.²¹

In summary, civil judicial enforcement cases are most likely to be appropriate when the violations are severe, injunctive relief is necessary, and/or a penalty should be assessed in excess of EPA's new administrative penalty authority.

B. Penalty Assessments

Naturally, in determining an appropriate settlement penalty, the CWA Civil Penalty Policy must be followed. Earlier this month, EPA distributed draft guidance -- "Penalty Calculations for a POTW's Failure to Implement It's Pretreatment Program" -- that explains the specific considerations involved in making penalty policy calculations for failure to implement violations. In short, EPA should collect a penalty that recovers a POTW's full economic benefit stemming from the pretreatment implementation noncompliance plus an additional gravity amount based on the type and pattern of the violations. The POTW's economic benefit may accrue from costs avoided by not hiring program personnel, not issuing IU wastewater discharge permits, not conducting inspections or wastewater testing, failing to maintain records or submit reports, or failing to install or operate necessary equipment.

In applying the Penalty Policy adjustment factor for ability to pay to these cases, it should be stressed that since pretreatment programs are designed to control industrial discharges, the costs of the programs should be paid by IUs through appropriate user charges levied by a POTW. In assessing ability to pay, a POTW's ability to recover penalty amounts from its IUs is relevant. A per capita approach based simply on the residential service population of a POTW is not appropriate as the basis for establishing a settlement penalty for a POTW failure to implement case.

²¹ Recall that EPA is in the strongest position to enforce a pretreatment requirement if the requirement is expressly stated in the permit, in the approved program incorporated by reference into the permit, or in the regulations if the permit requires the POTW to comply with the regulations.

C. Joining Industrial Users (IUs) and States

If an IU has caused interference or pass through at the POTW, or has violated local limits, categorical standards or other pretreatment requirements, EPA may include such an IU in a civil enforcement action. The importance of joining an IU in an enforcement action is increased if an IU is a primary cause of a POTW's effluent limit violations or if the IU needs to install pretreatment equipment at its facility, especially if a POTW is unwilling or unable to force an IU to install the necessary equipment. In general, if an IU has obtained an economic benefit from its noncompliance with pretreatment standards and requirements and its noncompliance is contributing to a POTW's problems, then in order to obtain a complete remedy and an appropriate penalty consistent with the Agency's Penalty Policy, EPA may very well want to include such an IU in any judicial action brought against a POTW for failure to implement. Similarly, if a Region contemplates an enforcement action against an IU for pretreatment violations, which violations have caused problems at the POTW and the POTW has failed to adequately respond to the IU's violations, claims against the IU and the POTW should generally be joined in a single civil action.

Pursuant to §309(e) of the Act, whenever EPA brings a judicial enforcement action against a POTW, the state in which a POTW is located must be joined as a party. If state law prevents a POTW from raising revenues needed to comply with any judgment entered against it, the Act makes a state liable for payment of such expenses. States may be joined in judicial enforcement actions against POTWs for failure to implement as either defendants or plaintiffs, as appropriate. Further details on how to join states under §309(e) is found in EPA's February 4, 1987, "Interim Guidance on Joining States as Plaintiffs."

IN THE UNITED STATES DISTRICT COURT
FOR THE [blank] DISTRICT OF [State]
[blank] DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil No. _____
)	
THE CITY OF [City], [state])	
and STATE OF [state],)	
)	
Defendants.)	
_____)	

CONSENT DECREE

WHEREAS, Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("U.S. EPA"), having filed the Complaint herein on [date], alleging that Defendant, City of [City] ("[City]" or "the City"), had violated the Clean Water Act (the "Act"), 33 U.S.C. §§ 1251 et seq., and the terms and conditions of its National Pollutant Discharge Elimination System ("NPDES") Permit, Permit Number [?];

WHEREAS, the City of [City], [state], owns and operates a publicly owned (wastewater) treatment works ("POTW"), located in [location];

WHEREAS, the United States also named the State of [state] as a Defendant pursuant to Section 309(e) of the Act, 33 U.S.C. §1319 (e) in the complaint filed herein; [or: the State of [state] has intervened/realigned as a Plaintiff, but remains potentially liable pursuant to Section 309(e) of the Act, 33 U.S.C. §1319(e); and

WHEREAS, Plaintiff[s] and Defendant[s], having agreed that the settlement of this matter without further litigation is in the public interest, and the Court being duly advised on the premises;

NOW, THEREFORE, before the taking of any testimony, upon the pleadings, without adjudication of any issue of fact or law, except as specifically provided herein, and

upon the consent and agreement of the parties to this Consent Decree by their attorneys and authorized officials, it is hereby Ordered, Adjudged and Decreed as follows:

I. JURISDICTION

1. This Court has jurisdiction over the subject matter herein and the parties consenting hereto pursuant to 28 U.S.C. §§ 1345 and 1355, and Section 309 of the Act, 33 U.S.C. § 1319. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) and (c) and 1395(a), and Section 309(b) of the Act, 33 U.S.C. § 1319(b). The Complaint states claims upon which the Court can grant relief against the Defendants.

II. BINDING EFFECT

2. This Consent Decree shall apply to and be binding upon the parties to this action, their officers, directors, agents, servants, employees, successors, assigns, and all persons in active concert or participation with them. Defendant [City], through its officers and agents, shall give notice of this Consent Decree to any successor in interest prior to transfer of ownership or operation of the whole, or any part of, Defendant [City]'s POTW and shall provide a copy of this Consent Decree to any successor in interest. Defendant [City] shall notify all parties to this Consent Decree, at least two weeks in advance, of any such transfer. In any action to enforce this Consent Decree Defendant [City] shall not raise as a defense the failure by any of its agents, servants, contractors or employees to take actions necessary to comply with the Decree.

III. OBJECTIVES

3. The express purpose of the parties in entering into this Consent Decree is to further the goals of the Act, specifically Sections 101, 301, and 307 of the Act, 33 U.S.C. §§ 1251, 1311, & 1317. All plans, studies, construction, remedial maintenance, monitoring programs, inspections, pretreatment program activities, [others specific to the case] and other obligations in this Decree shall have the objective of causing [City] to come into and remain in full compliance with the Act, including compliance with the terms and conditions of NPDES Permit Number [?], renewals or amendments to the Permit, its Pretreatment Program, and the provisions of applicable Federal and State laws and regulations governing [City]'s operation of its POTW, and discharges from this facility.

IV. COMPLIANCE PROGRAM

4. The [City]'s Pretreatment Program, approved by [EPA Region #/State EPA] on [date], the [City]'s Ordinance implementing the program, Ordinance No. [identify appropriate City laws and regulations], and [other relevant documents], are hereby incorporated into this Consent Decree by reference as if set forth in full detail. These documents shall hereafter be collectively referred to as the [City] "Pretreatment Program."

5. Defendant [City] shall fully implement and effectively enforce the provisions of the Pretreatment Program. The City's failure to fully and timely implement any provision of the Pretreatment Program shall constitute a violation of this Consent Decree.

6. Defendant [City] shall take timely, appropriate, and effective enforcement action, as described in and required by [specify relevant part of Pretreatment Program, e.g., its Enforcement Response Plan/Guide] to remedy violations by industrial users. [If City does not have an ERP, see p14]

[Note: paragraphs 6 through 14 below should be included, as appropriate, to remedy pretreatment violations in the case at hand. These paragraphs capture many of the key activities that a POTW should perform in order to implement an effective pretreatment program.]

7. Defendant [City] shall, no later than [date], compile an Industrial User Survey, utilizing information collected through the Wastewater Discharge Permit applications, its standard operating procedures for updating [as found in specific section of its pretreatment program], and all other information available to [City]. In the Industrial User Survey the City shall identify and locate all possible Industrial Users which might be subject to the POTW Pretreatment Program, identify the character and volume of pollutants contributed to the POTW by each Industrial User, and designate a list of Significant Industrial Users. Defendant City shall mail a copy of its Industrial User Survey to U.S. EPA by [30 days after completion date above]. U.S. EPA [and state EPA] may designate additional Industrial Users as Significant Industrial Users, based on the results of the Industrial User Survey or other information available to either agency.

8. Defendant [City] shall update the Industrial User Survey on an annual basis for the duration of this Consent Decree, consistent with all other requirements of its Pretreatment Program.

9. By [date], Defendant [City] shall commence an enforcement action against each Industrial User that has failed to submit the wastewater discharge permit application required by the [City]'s [applicable City law/pretreatment program]. [alternatively: Defendant [City] may issue a permit to an Industrial User that failed to make a timely application or Defendant may prohibit such an Industrial Users continued discharge into its POTW.]

10. Defendant [City] shall inspect the pretreatment facilities and sample the effluent of its Significant Industrial Users pursuant to the schedule set out below [specify an appropriate schedule]. Defendant shall prepare a report detailing the findings of each inspection and sampling visit and mail a copy of each report to U.S. EPA within 30 days following the inspection.

11. Wastewater Discharge Permits

a. By [date], Defendant [City] shall issue Wastewater Discharge Permits to all Significant Industrial Users.

b. Defendant [City] shall include an enforceable compliance schedule in the wastewater discharge permit for each Significant Industrial User that cannot comply within 3 months of permit issuance with applicable federal categorical pretreatment standards, the general and specific prohibitions in 40 C.F.R. 403.5, and local limits. The compliance schedule shall result in full compliance within one year of permit issuance, unless the final compliance date for the applicable federal categorical pretreatment standard is more than one year after the date of permit issuance, in which case, the permit shall contain a compliance schedule which results in compliance by the final compliance date for that categorical pretreatment standard.

c. Within 30 days after each Significant Industrial User is required to be in compliance with all applicable pretreatment standards in its wastewater discharge permit, Defendant [City] shall independently verify that the Significant Industrial User has attained compliance with all applicable pretreatment standards.

12. Defendant [City] shall sample and assess the impacts of toxic pollutants (listed in 40 C.F.R. Part 403, Appendix B) [and other pollutants, list those that are of concern] on the POTW's effluent, sludge and receiving waters. Defendant [City] shall initiate the monitoring and assessment within thirty (30) days of entry of this Consent Decree and carry it out in accordance with the [Fate and Effect Analysis Workplan for Local Limit Development contained in its program/EPA guidance]. Defendant [City] shall complete this sampling and assessment within 12 months of the date of entry of this Consent Decree.

13. Local Limits Development and Enforcement.

a. Based on the sampling and monitoring required by Paragraph [?], Defendant [City] shall prepare a report identifying all pollutants that have the potential to Pass Through or Interfere with its POTW. In the report Defendant [City] shall identify pollutants with a potential to Pass Through by referring to State Water Quality Standards, U.S. EPA Gold Book Criteria, and other available scientific literature. In the report Defendant [City] shall identify pollutants with a potential to Interfere by referring to available scientific literature or by conducting a site-specific study to determine the actual level of pollutants which will Interfere with its POTW. In the report Defendant [City] shall propose final local limits designed to prevent Pass Through and Interference by any pollutant identified by Defendant [City] as having the potential to Pass Through or Interfere with its POTW.

b. Defendant [City] shall submit the report, detailing the Fate and Effects Analysis and proposing final local limits, to U.S. EPA and [state] EPA within thirty (30) days following the end of the 12-month POTW sampling program described in paragraph [?] above. Defendant [City] shall officially enact final local limits within thirty (30) days following receipt of U.S. EPA comments. Establishing effective local limits, that fully implement the prohibitions in 40 C.F.R. 403.5 remains the sole responsibility of [City].

c. Defendant [City] shall notify, in writing, each Industrial User of the final local limits adopted by the City within 30 days following the City's official adoption of the local limits. Defendant [City] shall establish an enforceable compliance schedule [in the wastewater discharge permit] for each Industrial User that cannot comply with the local limits within 3 months of notification. The compliance schedule shall result in full compliance with all local limits within one year of notification.

d. Defendant [City] shall enforce the final local limits consistent with the requirements of its Pretreatment Program and this Consent Decree in a timely and effective manner.

14. Defendant [City] shall develop and implement an Enforcement Response Plan (ERP) describing how it will identify violations and respond to different types of Industrial User noncompliance, including time frames within which informal and formal enforcement responses will be initiated. Pursuant to the specifics contained in its ERP, Defendant [City] shall respond initially to each industrial user violation within 30 days from the date the violation is reported to the City or identified by the City. Defendant [City] shall submit the proposed ERP to U.S. EPA for review and approval by [date]. Within 30 days following U.S. EPA approval of the ERP, defendant [City] shall fully implement the ERP. [Region should also try to get City to agree to modify permit or pretreatment program to incorporate the newly developed ERP.]

15. [Other: Establish an expeditious schedule for the City to perform any other pretreatment implementation activity that it has failed to perform adequately or that is otherwise appropriate. For example, RCRA/hazardous waste handling or requiring the City to establish more frequent IU self-monitoring in its wastewater discharge permits.]

V. EFFLUENT LIMITS

16. Defendant [City] shall, at a minimum, comply with the following interim effluent limits and monitoring requirements at its POTW from the date of lodging of this decree until [date] : [interim limits may not be necessary in all cases, nor be appropriate for all parameters]

<u>Parameter</u>	<u>30-day Average</u>	<u>7-day Average</u>	<u>Loading (30-day Average)</u>
------------------	---------------------------	--------------------------	---

Biochemical Oxygen
Demand (5-day) (BOD₅)

Total Suspended Solids

[Other parameters, daily max limits?]

Monitoring Requirements

Measurement	
Frequency	Three times per calendar week
Sample	
Type	Consistent with the NPDES permit

17. Except for the interim effluent limits and monitoring specified in the preceding paragraph, commencing from the date of lodging of this Consent Decree, Defendant [City] shall comply with all other final effluent limits and monitoring requirements set forth in its NPDES Permit. Defendant City shall comply with all final effluent limits and monitoring requirements in its Permit as soon as possible, but no later than [date].

VI. MONITORING AND REPORTING

18. Defendant [City] shall provide quarterly progress reports to the U.S. EPA, Region [#], [and the [state] EPA]. Defendant [City] shall submit the first quarterly report [by specific date or 30 days after entry]. Subsequent reports shall be mailed by the City no later than 15 days after the close of the preceding calendar quarter (i.e., April 15, July 15, October 15, & January 15). In the progress reports Defendant [City] shall fully describe its pretreatment implementation activities during the calendar quarter and any other activities related to complying with this Decree. These quarterly progress reports are in addition to any other reporting requirements established in [City]'s Pretreatment Program or NPDES permit.

19. At a minimum, Defendant [City] shall include in each quarterly progress report the following information:

a. An updated list of all Industrial Users, including identification of Significant Industrial Users, as defined in the [City]'s Ordinance;

b. A copy of all permits issued to Industrial Users in accordance with the approved program by [City] during the reporting period;

c. A copy of all reports of scheduled, non-scheduled and demand industrial inspections completed by [City];

d. An assessment of the compliance status of all Industrial Users, including a description of all pretreatment inspections carried out by [City], a description of Industrial User compliance or noncompliance with pretreatment reporting requirements, permit requirements, discharge standards, and compliance schedules;

e. A descriptive summary of compliance and enforcement activities undertaken by [City] during the reporting period, including, but not limited to, any actions taken to enforce the Pretreatment Program, such as Notices of Violation, Compliance Meetings, Fines, Administrative Orders, Permit Revocations, Injunctions, Disconnections, and Litigation, as well as the outcome of those actions; and

f. A description of any new or potential Industrial Users which the City knows, or should know in the exercise of due diligence, are seeking to connect to the POTW, including, but not limited to, the name, location, and proposed activity of the industry, the volume of the proposed discharge and its projected chemical composition, and a certification as to whether the industrial user will be able to achieve compliance with all applicable Federal, State and local pretreatment requirements. "Potential Industrial Users," as used herein, shall mean an entity coming within the definition of "Industrial User" contained in the City's Pretreatment Program that has demonstrated an interest in locating within the area by, e.g., applying to [City] or [County] for a building permit or a business license, or by entering into a contract (of which [City] has knowledge) to acquire premises by purchase or lease.

20. Defendant [City] shall provide a description of all substantial changes it proposes to make to its Pretreatment Program, including, but not limited to, any change in its Pretreatment Ordinance, program administration, program structure, monitoring requirements, or program funding. Defendant [City] shall seek and obtain written approval from U.S. EPA before making any such change.

21. Defendant [City] shall perform all analyses associated with this Consent Decree pursuant to the analytical procedures approved in 40 C.F.R. Part 136. Defendant [City] shall take influent and effluent samples on a 24-hour composite basis, with sample results reported in milligrams per liter. Defendant [City] shall take effluent samples one detention period after collection of the influent sample. Defendant [City] may take sludge samples by grab

sample following sludge digestion. Defendant shall report the results of sludge analyses on a dry weight basis in milligrams per kilogram (mg/kg). [optional - this p may be deleted if these requirements are in permit]

VII. CIVIL PENALTY

22. Defendant [City] shall pay a civil penalty in the amount of \$ _____ in full satisfaction of the United States' claims for violations as alleged in the complaint filed herein through the date of lodging of this Decree. Defendant [City] shall, within fifteen (15) days after the entry of this Consent Decree, tender to the U.S. EPA, Region [#], Lock Box [] [address], [or to U.S. Attorney's office in some regions] a certified or cashier's check for \$ [____], payable to the "Treasurer, United States of America." Defendant [City] shall send a copy of the transmittal letter and the check to the addresses specified in paragraph [#].

VIII. STIPULATED PENALTIES

23. If Defendant [City] fails to fully and timely comply with any requirement of this Consent Decree, Defendant [City], shall pay stipulated penalties, as set forth below:

a. For failure to comply with any requirement of the Pretreatment Program or any requirement in Section IV of this Consent Decree:

<u>Pretreatment Program Requirement</u>	<u>Stipulated Penalty Per Day, Per Violation</u>
[describe each particular requirement in detail or reference particular section of program]	\$ [1000]

b. Defendant [City] shall pay the following stipulated penalties for noncompliance with any interim effluent limitation contained in this Consent Decree:

<u>Violation of Each Parameter (e.g., BOD, TSS)</u>	<u>Penalty</u>
Daily Maximum	\$ 500 per day
7-Day Average Concentration or Load Limit	\$1,000.00 per week
30-Day Average Concentration or Load Limit	\$2,000.00 per month

c. Defendant [City] shall pay the following stipulated penalties for noncompliance with any final effluent limitation contained in this Consent Decree or in the Permit:

<u>Violation of Each Parameter (e.g., BOD, TSS)</u>	<u>Penalty</u>
Daily Maximum	\$1,000 per day
7-Day Average Concentration or Load Limit	\$2,000.00 per week
30-Day Average Concentration or Load Limit	\$4,000.00 per month

d. Defendant [City] shall pay a stipulated penalty of \$500 per day for each violation of any other requirement of this Consent Decree which is not specifically covered by the stipulated penalties in subparagraphs a, b and c above. [This covers reporting and monitoring, and serves as a safety to ensure that all requirements are covered].

24. In any dispute over the applicability of stipulated penalties, Defendant [City] shall bear the burden of proving that it is not subject to stipulated penalties.

25. Defendant [City] shall pay stipulated penalties by certified or cashier's check, made payable to "Treasurer, United States of America," and tender the payment to [office and address] by the 15th of the month following the month in which the violation(s) occurred, together with a letter summarizing the violation(s), for which the penalty payment is made. Defendant [City] shall send a copy of the transmittal letter and the check to the addresses specified in paragraph [#].

26. Stipulated penalties are not Plaintiff's exclusive remedy for violations of this Consent Decree. Plaintiff expressly reserves the right to seek all other relief, monetary and injunctive, to which it is entitled.

IX. LATE PAYMENT CHARGE

27. Defendant [City] shall pay interest, at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, for any delinquent payment of a civil or stipulated penalty. In addition, after the first (30) days that any amount of a penalty is overdue, Defendant [City] shall pay a late payment handling charge of Twenty Dollars (\$20.00), and an additional charge of Ten Dollars (\$10.00) for each and every subsequent thirty day period for which any monies are overdue.

X. FAILURE OF COMPLIANCE

28. The United States does not, by its consent to the entry of this Decree, warrant or aver in any manner that the City's complete compliance with this Decree will result in compliance with the Act or its NPDES permit. Notwithstanding the U.S. EPA's review and approval of any plans or procedures formulated pursuant to this Decree, the City shall remain solely responsible for compliance with the terms of the Act, this Decree, its NPDES permit, and all applicable state and federal regulations.

XI. DISPUTE RESOLUTION

29. If the parties are unable to agree upon any procedure, plan, standard, requirement, or other matter described herein, or in the event a dispute should arise among the parties regarding the implementation of this Decree, the City shall follow the position of the United States unless it files a petition with the Court for resolution of the dispute within 30 days of receipt of the United States' final position concerning the dispute. In its petition to the Court, [City] shall set out the nature of the dispute with a proposal for its resolution. The United States shall have 30 days to file a response with an alternative proposal for resolution. In any such dispute, the City shall have the burden of proving that the U.S. EPA's proposal is arbitrary and capricious and not in accord with the objectives of this Decree, and that the City's position will achieve compliance with the terms and conditions of its permit and the Act in an expeditious manner.

XII. DELAYS OR IMPEDIMENTS TO PERFORMANCE (Force Majeure)

30. If any event occurs which causes or may cause [City] to violate any provision of this Consent Decree, the City shall notify in writing the Court and all parties within ten days of when [City] first knew of the event or should have known of the event by the exercise of due diligence. In this notice the City shall specifically reference this section of the Decree and describe in detail the anticipated length of time the violation may persist, the precise cause or causes of the violation, and the measures taken or to be taken by the City to prevent or minimize the violation and any future violations. [City] shall adopt all reasonable measures to avoid and minimize such violations.

31. Failure by [City] to fully and timely comply with the notice requirement of this section as specified above shall render this section void and of no effect as to the particular event involved, and shall constitute a waiver of [City]'s right to obtain an extension of time for its obligations under this section based on such event.

32. U.S. EPA shall notify the City in writing of EPA's agreement or disagreement with [City]'s claim of a delay or impediment to performance within 45 days of receipt of the City's notice provided under this section. If U.S. EPA Region [#] agrees that the violation has been or will be caused entirely by circumstances beyond the control of the City or any entity controlled by the City, including its contractors, and that [City] could not have foreseen and prevented such violation by the exercise of due diligence, the parties may stipulate to an extension of the particular compliance requirement affected by the delay, by a period not exceeding the delay actually caused by such circumstances. Such a stipulation shall be filed as a modification to this Consent Decree pursuant to the Modification procedures established in this Decree. The City shall not be liable for stipulated penalties for the period of such delay.

33. If U.S. EPA does not agree with the City's claim of a delay or impediment to performance, the City may submit the matter to the Court for resolution pursuant to the Dispute Resolution Procedures established in this Decree. If the City submits the matter to the Court for resolution and the Court determines that the violation has been or will be caused entirely by circumstances beyond the control of the City or any entity controlled by the City, including its contractors, and that [City] could not have foreseen and prevented such violation by the exercise of due diligence, [City] shall be excused as to that violation, but only for the period of time the violation continues due to such circumstances.

34. [City] shall bear the burden of proving that any delay or violation of any requirement of this Consent Decree was caused or will be caused entirely by circumstances beyond the control of the City or any entity controlled by the City, including its contractors, and that [City] could not have foreseen and prevented such violation by the exercise of due diligence. Also, [City] shall bear the burden of proving the duration and extent of any delay attributable to such circumstances. An extension of one compliance date based on a particular event does not necessarily result in an extension of a subsequent compliance date or dates. The City must make an individual showing of proof regarding each delayed incre-

mental step or other requirement for which an extension is sought.

35. Unanticipated or increased costs or expenses associated with the implementation of this Decree, changed financial circumstances, or technical problems shall not, in any event, serve as a basis for changes in this Decree or extensions of time under this Decree.

XIII. RIGHT OF ENTRY

36. Until termination of this Consent Decree, U.S. EPA and/or its representatives, contractors, consultants, and the attorneys for the United States shall have the authority to enter any facility covered by this Decree, during reasonable hours, upon presentation of credentials to the manager(s) of the facility, or in the manager's absence, to the highest ranking employee present on the premises, for the purpose of:

- a. monitoring the progress of activities required by this Decree;
- b. verifying any data or information submitted to the U.S. EPA in accordance with the terms of the Decree;
- c. obtaining samples, and upon request, splits of any samples taken by the City or it's contractors and consultants; or
- d. assessing the City's compliance with this Decree.

This provision in no way affects or reduces any rights of entry or inspection that the United States has under any Federal law or regulation.

XIV. FUNDING

37. Performance of the terms of this Consent Decree by Defendant [City] is not conditioned on the receipt of any Federal or State grant funds. In addition, City's performance is not excused by the failure to obtain or shortfall of any Federal or State grant funds, or by the delay from processing of any applications for the same.

XV. FORM OF NOTICE

38. Notifications, reports or other communications with EPA, the State or the United States shall be deemed submitted on the date they are postmarked and sent by certified mail, return receipt requested. Except as specified otherwise, when written notification to or communication with the United

States, EPA Region [#], City, or the State is required by the terms of this Consent Decree, it shall be addressed as follows:

As to the United States:

Chief, Environmental Enforcement Section
Land and Natural Resources Division
U.S. Department of Justice
Post Office Box 7611
Ben Franklin Station
Washington, D.C. 20044
Reference Case No. [#]

As to EPA Region #:

Enforcement Branch
Compliance Section
Water Division
U.S. Environmental Protection Agency
Region [X]
Street
City, State, Zip

As to the State:

As to Defendant City:

XVI. NONWAIVER PROVISIONS

39. This Consent Decree is neither a NPDES permit nor a modification of any existing NPDES permit and shall not be interpreted to be such. The pendency or outcome of any proceeding concerning the issuance, re-issuance or modification of an NPDES permit shall neither affect nor postpone [City]'s duties and obligations as set forth in this Decree

40. This Consent Decree in no way alters or relieves Defendant [City]'s responsibility to comply with any and all other Federal, State or local laws, regulations, or permit conditions. The parties agree that [City] is responsible for achieving and maintaining complete compliance with all applicable Federal and State laws, regulations, and permits, and that compliance with this Decree shall not be a defense to any actions commenced pursuant to such laws or regulations.

41. Plaintiff expressly reserves the right to pursue all remedies available to it to remedy all violations of the Act not specifically pled in the Complaint filed in this matter.

42. Nothing herein shall be construed to limit the authority of the United States or the State of [name] to undertake any action against any person, including the Defendant [City], in response to conditions which may present an imminent and substantial endangerment to the public health, welfare or the environment.

43. Nothing herein shall be construed to limit the authority of the United States to act under Section 308 of the Act, 33 U.S.C. § 1318.

44. This Consent Decree does not limit or affect the rights of the Plaintiff[s] or Defendant[s] against any third parties (parties not specifically part of this Decree), nor does it limit the rights of such third parties against the City.

XVII. CONTINGENT LIABILITY OF STATE

45. This Consent Decree does not resolve the contingent liability of the State of [state] under Section 309(e) of the Act, 33 U.S.C. § 1319(e). The United States reserves, and this Decree is without prejudice to, any rights or claims that the United States has or may have against the State of [state] under Section 309(e). [if requested by state: The Attorney General of the State of [state] certifies that the present laws of the State do not prevent [City] from raising revenue needed to comply with this Decree. The State of [state] reserves its right to deny that the United States has any rights under Section 309(e) against it.]

XVIII. MODIFICATION

46. Except as provided herein, there shall be no modification of this Consent Decree without the written approval of all the parties and the Court.

XIX. COSTS OF SUIT

47. Each party to this action shall bear its own costs and attorney's fees.

XX. SEVERABILITY

48. The provisions of this Consent Decree shall be severable, and should any provisions be declared by a court of competent jurisdiction to be inconsistent with State or Federal law and, therefore, unenforceable, the remaining provisions shall remain in full force and effect.

XXI. PUBLIC NOTICE

49. The parties acknowledge and agree that the final approval and entry of this Consent Decree is subject to the requirements of 28 C.F.R. § 50.7, which provides that notice of proposed Consent Decrees be given to the public and that the public shall have at least thirty (30) days in which to make any comments.

XXII. TERMINATION

50. The Court shall retain jurisdiction of this case after entry of this Consent Decree to enforce compliance with the terms and conditions of this Consent Decree and to take any action necessary or appropriate for its interpretation, construction, execution or modification. During the term of this Consent Decree, either party may apply to the Court for any relief necessary to construe or effectuate this Consent Decree.

51. This decree shall terminate by motion of any party to the Court after each of the following has occurred:

- a. Defendant City has achieved compliance with all provisions contained in this Decree and has maintained compliance with each and every provision of this Decree for 12 [or longer] consecutive months;
- b. Defendant City has paid all penalties due hereunder and no penalties are outstanding or owed to the United States;
- c. Defendant City has certified compliance pursuant to a and b above to the Court and all parties; and
- d. U.S. EPA, within 30 days of receiving such certification from the City, has not contested, in writing, that such compliance has been achieved. If U.S. EPA disputes defendant's full compliance, the dispute resolution provision shall be invoked and the Decree shall remain in effect pending

resolution of the dispute by the parties or the Court.

Dated and entered this _____ day of _____

[Printed Name of Judge]
UNITED STATES DISTRICT JUDGE

WE HEREBY CONSENT to the entry of this Decree,
subject to the public notice requirements of 28 C.F.R. §
50.7.

FOR PLAINTIFF THE UNITED STATES OF AMERICA:

[Printed Name]
Assistant Attorney General
Land and Natural Resources Division
United States Department of Justice
Washington, D.C. 20530

Dated

[Printed Name], Attorney
Environmental Enforcement Section
Land and Natural Resources Section
United States Department of Justice
Washington, D.C. 20530

Dated

[Printed Name]
United States Attorney
[blank] District of [blank]

By: _____
[Printed Name]
Assistant United States Attorney
Street
City, State Zipcode

Dated

[Printed Name]
Assistant Administrator for
Enforcement and Compliance
Monitoring
U.S. Environmental Protection Agency
401 M Street, SW
Washington, D.C. 20460

Dated

[Printed Name]
Regional Administrator
United States Environmental Protection
Agency, Region [#]
Street
City, State Zipcode

Dated

FOR DEFENDANT, CITY OF [City], [state]

[Printed Name of Mayor]
Honorable Mayor of [City]

Dated

[Attorney's Printed Name]
Attorney for City of [City]

Dated

FOR DEFENDANT, STATE OF [state]

[Printed Name of AG]
Attorney General for [state]

Dated

Attachment A

Model Form for Listing and Evaluating Pretreatment Implementation Violations

SUMMARY OF PRETREATMENT IMPLEMENTATION VIOLATIONS
FOR _____

ENFORCEMENT SENSITIVE - PREPARED IN ANTICIPATION OF LITIGATION

Prepared by: _____ on _____

NPDES permit effective date: _____; expiration date _____

DATE POTW pretreatment program approved: _____

Is approved program incorporated by reference into permit? _____ When _____

Does the permit require the POTW to comply with 40 CFR 403? _____

Date POTW listed on QNCR for Reportable Noncompliance _____

Directions for the use of this form:

This form should be used to briefly describe each violation, indicate its duration, identify the pretreatment implementation requirement that was violated (e.g., violation of §x of the permit), and then rate the severity of the violation using the scale below. Violations may be identified pursuant to §IV of EPA's "Guidance on Bringing Enforcement Actions Against POTWs for Failure to Implement Pretreatment Programs".

The numerical scale below may be used to evaluate the severity of each violation. Each violation should be rated with a number 1 to 5 pursuant to this scale:

1. Minor violation with little if any impact on success of pretreatment program.
2. Violation has distinct negative impact on effectiveness of pretreatment program
3. Violation is allowing IUs to violate local limits and/or categorical limits.
4. POTW's final effluent limits are being exceeded.
5. Violation has caused an injury or risk of injury to human health/environment.

Description of Violation

Duration

Source of Pretreatment
Implementation Requirement

Severity of
ViolationEvidence

Total Severity Score

ATTACHMENT B

Model Civil Judicial Complaint for a POTW's Failure to Implement its Pretreatment Program

August 4, 1988

The attached model complaint contains most of the terms that are likely to be included when the United States files a civil action under the Clean Water Act against a City that has failed to fully implement its pretreatment program. This model complaint assumes that the City does not need to install equipment or construct additional treatment facilities at its plant. If such improvements are necessary, they should be so specified in a separate count in the complaint.

Copies of this complaint on floppy disks in the word processing program, WORDPERFECT 4.2, are available from David Hindin, EPA Headquarters, FTS 475-8547. In addition, a WORDPERFECT 4.2 copy of this complaint can be electronically transferred to the AMICUS computer terminal of any DOJ attorney.

In revising this model to fit the facts of an individual case, the information contained in brackets [] must be deleted and replaced with appropriate names and requirements specific to the case at hand.¹ Questions on this model complaint concerning substantive pretreatment matters or WORDPERFECT editing matters should be directed to David Hindin at EPA Headquarters, FTS 475-8547, 401 M Street, SW (LE-134W), Washington, D.C. 20460.

Disclaimer

This model complaint is intended solely for the use of EPA enforcement personnel. This model creates no rights, is not binding on the Agency, and the Agency may change this model without notice.

¹ As a first step, the WORDPERFECT user of this complaint, should use the search and replace command, F2, to change [City] and [state] to the appropriate names for the case at hand. Also, note that automatic paragraph numbering was used to number the paragraphs.

IN THE UNITED STATES DISTRICT COURT
FOR THE [blank] DISTRICT OF [blank]
[blank] DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO.
)	
The City of [City], [state],)	
and the State of [state],)	
)	
Defendant[s].)	

COMPLAINT

The United States of America, through its undersigned counsel, and at the request and on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), alleges that:

NATURE OF ACTION

1. This is a civil action brought pursuant to Sections 309(b) and (d) of the Clean Water Act (the "Act"), 33 U.S.C. § 1319(b) and (d), for injunctive relief and assessment of civil penalties against the City of [City], [state], for its discharge of pollutants in violation of Section 301 of the Act, 33 U.S.C. §1311. Specifically, the [City] has violated certain terms and conditions of its National Pollutant Discharge Elimination System ("NPDES") permit, issued pursuant to Section 402 of the Act, 33 U.S.C. §1342, including the requirement to fully implement its pretreatment program. This action also seeks appropriate relief against the State of [state] pursuant to Section 309(e) of the Act, 33 U.S.C. § 1319(e).

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1345 and 1355, and Section 309(b) of the Act, 33 U.S.C. § 1319(b). Notice of commencement of this action has been given to the State of [state] and is further given by naming it as a defendant herein and serving this complaint.

3. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) and (c) and 1395(a), and Section 309(b) of the Act, 33 U.S.C. § 1319(b), because it is the judicial district in which the City of [City] is located and in which the alleged violations occurred.

PARTIES

4. Plaintiff is the United States of America, acting at the request and on behalf of the Administrator of EPA.

5. Defendant City of [City], [state], ("the City") is a "municipality" within the meaning of Section 502(4) of the Act, 33 U.S.C. § 1362(4).

6. The State of [state] is joined as a defendant in this action pursuant to Section 309(e) of the Act, 33 U.S.C. § 1319(e). [this paragraph can be altered if state will re-align as a plaintiff, see third claim, herein.]

STATUTORY REQUIREMENTS

7. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person except in compliance with that section and, inter alia, Sections 307 and 402 of the Act, 33 U.S.C. § 1317 and 1342.

8. Section 307(b) of the CWA, 33 U.S.C. § 1317(b), directs the Administrator of the EPA to publish regulations establishing pretreatment standards governing the introduction of pollutants into publicly owned treatment works ("POTWs") for pollutants that are determined not to be susceptible to treatment by such treatment works or that would interfere with the operation of such treatment works.

9. The Administrator of EPA promulgated "General Pretreatment Regulations for Existing and New Sources of Water Pollution", 40 C.F.R. §403, to assure implementation of the pretreatment standards established under Section 307(b) of the CWA, 33 U.S.C. § 1317(b).

10. Pursuant to Section 402 of the Act, 33 U.S.C. §1342, the EPA Administrator may issue an NPDES permit which authorizes the discharge of pollutants directly into navigable waters of the United States, but only upon compliance with the applicable requirements of Section 301 of the Act, 33 U.S.C. § 1311, and such other conditions as the Administrator determines are necessary to carry out the provisions of the Act. [The EPA Administrator approved [state]'s

proposal to administer the NPDES permit program in [state], pursuant to Section 402(b) of the Act, 33 U.S.C. §1342(b).

11. Section 309(b) of the Act, 33 U.S.C. §1319(b), authorizes the EPA Administrator to commence a civil action for appropriate relief, including a permanent or temporary injunction, when any person is in violation of Sections 301, 302, 306, 307, 308, 318, or 405 of the Act, 33 U.S.C. §§ 1311, 1312, 1316, 1317, 1318, 1328, or 1345, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under Section 402 of the Act, 33 U.S.C. 1342.

12. Section 309(d) of the Act, 33 U.S.C. §1319(d), provides that any person who violates section 301, 302, 306, 307, 308, 318, or 405 of the Act, 33 U.S.C. §§ 1311, 1312, 1316, 1317, 1318, 1328, or 1345, or violates any permit condition or limitation implementing any of such sections in a permit issued under Section 402 of the Act, 33 U.S.C. 1342, or violates any requirement imposed in a pretreatment program, or violates any order issued by the Administrator under Section 309(a) of the Act, 33 U.S.C. §1319(a), shall be subject to a civil penalty not to exceed \$25,000 per day for each such violation. Before February 4, 1987, Section 309(d), 33 U.S.C. §1319(d), authorized penalties not to exceed \$10,000 per day for each such violation.

GENERAL ALLEGATIONS

13. The City owns and operates a POTW located at [address]. The POTW receives and treats wastewater from [residential, commercial and industrial] sources and then discharges this wastewater into [name of navigable water].

14. The City "discharges pollutants" within the meaning of Sections 502(6) and (12) of the Act, 33 U.S.C. § 1362(6) and (12), from its POTW through a "point source" within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14), into [river/stream], which is a "navigable water" within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7), and 40 C.F.R. § 122.2.

15. Pursuant to Section 402(a) of the Act, 33 U.S.C. § 1342(a), EPA issued to the City NPDES Permit No. [#] ("Permit") on [date]. [if state issued permit: The [state] EPA issued to the City NPDES Permit No. [#] ("Permit") on [date]] [The Permit was modified on date.] The Permit will expire on [month, day], 19[].

16. The Permit authorized and continues to authorize the City to discharge pollutants from its POTW into [river/stream], subject to certain limitations and conditions. Specifically, the Permit contains specific limitations on the amounts of [biochemical oxygen demand or BOD (a measure of the oxygen used by a pollutant), total suspended solids, fecal coliform bacteria, etc.] that can be discharged [daily, weekly and monthly] by the City's POTW.

17. The Permit also prescribes certain monitoring, reporting and operation requirements [including a requirement that the City maintain its POTW in good working order and operate its POTW as efficiently as possible].

18. As required by 40 C.F.R. §403.8 [and its Permit], the City developed a Pretreatment Program to control pollutants contained in the wastewater of its non-domestic users.

19. On or about, [date], the [U.S. EPA/state EPA] approved the City's Pretreatment Program in accordance with 40 C.F.R. 403.11.

20. As of [date], the City's NPDES permit [was modified to] incorporates by reference the approved Pretreatment Program as a term and condition of its NPDES permit. The City's NPDES Permit expressly requires [City] to fully implement its Pretreatment Program [and also summarize some of the key pretreatment activities the permit language itself required the City to perform].

FIRST CLAIM FOR RELIEF

21. Paragraphs 1 through __ are realleged and incorporated herein by reference.

22. The City has failed to fully implement its Pretreatment Program in violation of its NPDES permit, condition [#]. The City's pretreatment implementation violations include, but are not limited to, the following:

[Violations should be specified clearly, identify section of permit or program that was violated where possible. The list below is representative of likely violations]

- a. Failure to issue control mechanisms (permits) to all industrial users;
- b. Issuance of deficient permits to industrial users [specify how deficient if possible];
- c. Failure to inspect and monitor "significant industrial users";
- d. Failure to respond to instances of industrial user noncompliance with applicable pretreatment standards and requirements;
- e. Failure to establish local limits;
- f. Failure to undertake effective enforcement against industrial users that have caused interference or pass through violations at [City]'s plant;
- g. Failure to effectively enforce pretreatment standards and requirements against violating industrial users.
- h. Failure to publish, annually [check frequency required by program/permit], in the largest daily newspaper, a list of those industrial users which, during the previous 12 months, were significantly violating applicable Pretreatment Standards and Requirements;
- i. Failure to submit a pretreatment report [specify];

j. Failure to establish a Pretreatment Program budget [or hire adequate staff, purchase necessary equipment] adequate to allow for full implementation.

23. Defendant [City]'s failure to implement its Pretreatment Program in a timely manner has contributed to and is contributing to [City]'s violations of some of the effluent limits in its NPDES Permit. [check this carefully]

24. Defendant [City]'s failure to fully implement its Pretreatment Program pursuant to Condition [#] of its NPDES Permit is a violation of a permit condition or limitation implementing Sections 301, 307 and 308 of the CWA, 33 U.S.C. §§ 1311, 1317 and 1318, in a permit issued pursuant to Section 402 of the Act, 33 U.S.C. §1342.

25. Pursuant to Sections 309(b) and 309(d) of the Act, 33 U.S.C. § 1319(b) and (d), Defendant [City] is subject to injunctive relief and is liable for civil penalties for each day of each violation alleged in this claim.

26. Unless restrained by order of the Court, [City] will continue to violate Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342.

SECOND CLAIM FOR RELIEF

27. Paragraphs 1 through __ are realleged and incorporated herein by reference.

28. Since [date or when the City's NPDES permit became effective on date], Defendant [City] has discharged

and continues to discharge, pollutants into the [River], in excess of the effluent limitations in its Permit. Specifically, based on the information reported by the City in its Discharge Monitoring Reports (DMRs) [and on monitoring performed by EPA on date] the City has exceeded the effluent limits in its Permit for such pollutants as [specify pollutants]. [A table of effluent violations is attached as Exhibit # .]

29. Each of Defendant [City]'s discharges of pollutants in excess of levels authorized by its Permit is a separate violation of a permit condition or limitation implementing Section 301 of the Act, 33 U.S.C. §1311, in a permit issued pursuant to Section 402 of the Act, 33 U.S.C. §1342.

30. Pursuant to Sections 309(b) and 309(d) of the Act, 33 U.S.C. § 1319(b) and (d), [City] is subject to injunctive relief and is liable for civil penalties.

31. Unless restrained by order of the Court, [City] will continue to violate Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

THIRD CLAIM FOR RELIEF

[Note: State may be given opportunity to re-align as a Plaintiff if appropriate, but the United States still needs to reserve potential 309(e) claim. See "Interim Guidance on Joining States as Plaintiffs," dated December 24, 1986, as corrected February 4, 1987.]

32. Paragraphs 1 through __ are realleged and incorporated herein by reference.

33. Pursuant to Section 309(e) of the Act, 33 U.S.C. § 1319(e), the State of [state] is liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the City to the extent that its laws prevent the City from raising revenues needed to comply with such judgment.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, United States of America, prays that the Court:

1. Permanently enjoin the City from discharging pollutants except as expressly authorized by the Act and the City's NPDES permit;

2. Order the City to comply with all terms and conditions of its NPDES Permit No. _____ and the Act;

3. Pursuant to Section 309(d) of the Act, 33 U.S.C. § 1319(d), assess civil penalties against the City not to exceed \$10,000 per day for each violation prior to February 4, 1987, and \$25,000 per day for each violation since February 4, 1987 up to the date of judgment herein, of Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342, and of its NPDES permit;

4. Award relief against the State of [state] pursuant to Section 309(e) of the Act, 33 U.S.C. § 1319(e);]

5. Award the United States its costs and disbursements in this action; and

6. Grant the United States such other relief as this Court deems appropriate.

Respectfully submitted,

[Printed Name]
Assistant Attorney General
Land and Natural Resource Division
United States Department of Justice
Washington, D.C. 20530

[Printed Name]
United States Attorney
[blank] District of [blank]

By:

[Printed Name]
Assistant United States Attorney
[blank] District of [blank]

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OF COUNSEL:

[EPA REGIONAL & HQ Attorneys]

Attachment C

**Model Civil Judicial Consent Decree for a POTW's Failure
to Implement its Pretreatment Program
August 4, 1988**

The attached model consent decree contains most of the terms that are likely to be necessary for the United States to settle a Clean Water Act enforcement action against a City that has failed to fully implement its pretreatment program. This model decree assumes that the City does not need to install equipment or construct additional treatment facilities at its plant. If such improvements are necessary, they should be so specified in a compliance schedule in the decree.

Copies of this consent decree on floppy disks in the word processing program, WORDPERFECT 4.2, are available from David Hindin, EPA Headquarters, FTS 475-8547. In addition, a WORDPERFECT copy of this consent decree can be electronically transferred to the AMICUS computer terminal of any DOJ attorney.

In revising this model to fit the facts of an individual case, the information contained in brackets [] must be deleted and replaced with appropriate names and requirements specific to the case at hand.¹ Questions on this model consent decree concerning substantive pretreatment matters or WORDPERFECT editing matters should be directed to David Hindin at EPA Headquarters, FTS 475-8547, 401 M Street, SW (LE-134W), Washington, D.C. 20460.

Disclaimer

This model consent decree is intended solely for the use of EPA enforcement personnel. This model creates no rights, is not binding on the Agency, and the Agency may change this model without notice.

¹ As a first step, the WORDPERFECT user of this consent decree, should use the search and replace command, F2, to change [City] and [state] to the appropriate names for the case at hand. Also, note that automatic paragraph numbering was used to number the paragraphs.